Filed 4/20/12 Marriage of Friedman CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of REBECCA and MARC FRIEDMAN.	
REBECCA FRIEDMAN, Respondent, v. MARC FRIEDMAN, Appellant.	G044825 (Super. Ct. No. 10D004435) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Michael McCartin, Judge. Affirmed.

Camaur Crampton Family Law, and Elisabeth Camaur for Appellant.

Freid and Goldsman and Gary J. Cohen for Respondent.

* * *

Marc Friedman (husband) challenges the court's award of pendente lite attorney fees to Rebecca Friedman (wife) in the Friedmans' marital dissolution proceeding.[1] Husband contends the court erred by failing to consider two factors: (1) his obligation under a stipulated order to pay spousal support and mortgage payments; and (2) wife's earning ability. He further contends insufficient competent evidence supports the court's assessment of the fees' reasonableness. Wife asks us to dismiss or stay husband's appeal because he has allegedly violated court orders to pay her spousal support and litigation expenses. We deny wife's motion to dismiss, but affirm the court's order granting her pendente lite fees and costs.[2]

FACTS

Husband and wife were married in November 2000. They have no children together. Wife petitioned for dissolution of the marriage on May 11, 2010.

During the marriage, wife was a homemaker while husband handled the finances. Husband owns many businesses and surgical centers. The couple own a large residence and other vacation homes and a rental property, as well as many vehicles and boats.

On August 30, 2010, wife applied for an order to show cause (OSC), seeking at least $37,600 per month in spousal support, and an award of attorney fees of at least $75,000 and accountant fees of at least $50,000. She also requested exclusive

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[1] The court's order granting wife's motion for pendente lite attorney fees is appealable. (*In re Marriage of Weiss* (1996) 42 Cal.App.4th 106, 119 [direct appeal lies from "pendente lite attorney fees order where nothing remains for judicial determination except the issue of compliance or noncompliance with its terms"].)

[2] We deny wife's motion to strike portions of husband's reply brief, as such action is unnecessary in light of our disposition of the appeal.

possession of the family residence and that husband be ordered to pay the mortgage and other expenses for the family residence and four other real properties, as well as various insurance premiums. She attached declarations of her attorney and her forensic accountant, along with her attorney's itemized billing sheets.

On October 18, 2010 (the date set for the hearing on wife's OSC), the parties entered into a stipulation for an order, which required (1) husband to pay nontaxable spousal support of $10,000 per month to wife and to pay the mortgage on the family residence and one Florida property, as well as the homeowners association dues for two Florida properties; and (2) wife to take reasonable steps to become self-sufficient pursuant to *In re Marriage of Gavron* (1988) 203 Cal.App.3d 705.

The hearing on wife's OSC requesting attorney fees took place on December 16, 2010 (the December 2010 hearing). The parties stipulated the court would base its decision on counsels' arguments and on declarations, which included the following.

Wife's income and expense declaration filed December 6, 2010 reflected: (1) no income; (2) cash and accounts of $10,000 at most; (3) real property of an unknown value; and (4) average monthly expenses of $20,779, not including unknown amounts. As to attorney fees, to date she had paid her counsel $56,278 (from borrowed funds) and still owed him $75,000.

Husband's amended income and expense declaration filed September 7, 2010 reflected: (1) no income; (2) assets worth $2,755,211 encumbered by $1,025,000 owed; (3) debt of $5,272,107; and (4) average monthly expenses of $15,748. As to attorney fees, to date he had paid his counsel $10,000 (from borrowed funds) and owed nothing further. On an attachment, husband stated: "My businesses historically report minimal net income. I do not receive wages from any of my companies. Our living expenses have historically been paid through my businesses. I do not have financial statements prepared for my businesses nor do I have general ledgers. Documents

necessary to prepare financial statements, general ledgers and tax returns are currently in process of being obtained and will be provided to my accountant to prepare same."

In a declaration dated October 4, 2010, husband's forensic accountant, based on his discussions with husband and "information provided to date," concluded husband's average monthly income was $18,467. Husband's tax accountant had prepared various tax returns for 2007, 2008, and 2009, based solely on husband's "verbal representations."

The October 12, 2010 declaration of wife's forensic accountant asserted husband had "managed to acquire substantial assets in the last [two and one-half] years despite any visible means of income (at least based on the dated tax returns produced by and verbal representations made by [husband] to date)." The accountant concluded husband "has either sources of unreported income or undisclosed assets . . . ." "Based on limited information thus far made available," the accountant concluded husband has non-taxable income in the range of $70,967 per month to $78,967 per month.

At the December 2010 hearing, wife's counsel asked the court to order husband to pay $100,000 for wife's attorney fees and accountant fees. At one point, wife's counsel argued husband's payments required under the stipulated order for spousal support and mortgages were equal to about $26,000 per month as a gross, taxable figure.

Husband's counsel argued husband did not have the ability to pay his current obligations under the stipulated order, and could not afford to pay an additional amount for wife's attorney fees. Husband was claiming he was "in extreme debt and can't pay his expenses." In response to the court's question, husband's counsel, who had been recently retained, stated husband had paid her a $50,000 retainer for the dissolution case.

After listening to counsels' arguments, the court stated it tried to make an award that was "just and reasonable under the relative circumstances of the parties and taking into account Family Code [section] 4320 considerations, to the extent that they're

relevant, which a number of them aren't at this early stage. But the court has tried to do that, and we've discussed those factors." Husband "indicates there's a downturn in the economy. Well, that downturn has been going on for a couple of years and over the past two and a half years, . . . he's been able to purchase substantial assets." "He has been able to . . . retain his attorneys and pay them . . . . We don't know where [the] payment came from because there's not a more recent financial that would tell us that he used a credit card or got a loan or took it out of the safe or sold a boat or whatever." "[E]ven if we take [husband's accountant's] cash flow of . . . just under $20,000, [husband] hasn't paid anything since this thing started. . . . So that $20,000 that was going to pay his expenses, which included some of the mortgages and stuff, I'll assume he's been pocketing for a few months. So he's got some cash flow." "I think that is a ridiculously low amount when we figure out his income and look at the stipulation and look at what's been acquired recently. [¶] Now, I don't know if that got acquired from retained earnings in one of his corporations or whether it came out of the safe or some other fund or savings or anything, but the cash flow is certainly, if we take the last two and a half years, in excess of $50,000; and I think he is required to made a substantial contribution to her fees."

As to the reasonableness of the fees incurred, the court found that "most of the fees on both sides have been reasonably necessary in this case, unfortunately." "[T]he court feels that fees are reasonably necessary to be awarded based on the relative financial positions of the parties." "[T]o level the playing field the court feels it must make an attorney fee order, and the court's going to order the sum of $100,000 attorney fees and costs," payable in two installments of $25,000 and five installments of $10,000.

DISCUSSION

Wife's Requests for Judicial Notice

Wife requests we take judicial notice of certain bankruptcy orders and trial court pleadings connected with husband's retention of new counsel. Because the material has some relevance to her appeal and to her motion to dismiss the appeal (discussed below), the requests are granted. (Evid. Code, § 452, subd. (d).)

Wife's Motion to Dismiss the Appeal

Relying on *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669 and other cases, wife moves to dismiss (or, alternatively, stay) this appeal, unless and until husband pays her court-ordered spousal support, attorney fees, appellate fees and costs. Wife bases this request on husband's alleged failure to pay court-ordered spousal support and mortgage payments; discovery sanctions; and fees and costs awards. She argues husband should not be allowed to "use the appellate process to further delay enforcement of a lawful order for attorneys' fees and costs . . . ."

Husband counters there has been no finding he has a present ability to pay, under his current financial circumstances, the alleged amounts ordered. He asserts there has been no finding of contempt against him and no finding he willfully violated any court order. He notes this appeal challenges the trial court's finding he has the present ability to pay wife's attorney fees. He argues his due process right to appellate review on the merits should not be dismissed lightly.

Wife counters that, in her dismissal motion, she made a prima facie case of contempt and that husband has failed to prove an affirmative defense of inability to pay.

Although we recognize, as in *Alioto Fish*, that we can dismiss this case without a formal order of contempt, we also recognize that something more than a failure to comply with court orders is required. In *Alioto Fish*, the court was reviewing a number

of sanction orders in six consolidated appeals. "The successive orders to compel and imposing sanctions contain[ed] judicial findings that the appellants have persisted in willfully disobeying the trial court's orders." (*Alioto Fish Co. v. Alioto, supra,* 27 Cal.App.4th at p. 1683.)

Here, husband has *not* been sanctioned for failure to pay the ordered spousal support and fees and costs. In the interest of judicial economy, we decline to dismiss this appeal and will instead review on the merits the court's finding that husband has the financial ability to pay these sums. As discussed below, we affirm the court's finding.

The Court's Pendente Lite Attorney Fee Order

Husband contends the court failed to exercise its discretion and consider two of the mandatory statutory factors before ordering him to pay $100,000 of wife's pendente lite attorney fees. Specifically, he claims the court failed to take into account: (1) his obligation to pay spousal support under the stipulated order in determining his ability to pay, and (2) wife's earning ability. He further argues that the reasonableness of the fees awarded is unsupported by competent evidence.

We review the relevant Family Code statutes that govern attorney fee awards.[3] Section 2030 authorizes fee awards in marital dissolution cases. Section 2032 prescribes additional requirements for fee awards under section 2030. Section 4320 (referenced in § 2032, subd. (b)) sets forth the "circumstances" to be considered by a court.

Under section 2030, a court must "ensure that each party has access to legal representation" during the pendency of a marital dissolution proceeding by ordering one party to pay the other party's reasonably necessary attorney fees. (§ 2030, subd. (a)(1).)

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[3] All statutory references are to the Family Code unless otherwise stated.

If necessary, the court makes the attorney fee award based on income and needs assessments. (*Ibid.*) At the time of the court's order, subdivision (a)(2) of section 2030 provided: "Whether one party shall be ordered to pay attorney's fees and costs for another party, and what amount shall be paid, shall be determined based upon, (A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay."[4]

Section 2032 controls and supplements section 2030. As relevant here, section 2032 permits a court to make an attorney fee award under section 2030 where the award, and its amount, "are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) Section 2032 further provides: "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (§ 2032, subd. (b).)

Section 4320 (referenced in § 2032, subd. (b)) sets forth the "circumstances" to be considered by the court, if relevant. Those circumstances include

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[4] Effective January 1, 2011, i.e., after the court's ruling in this case, subdivision (a)(2) of section 2030 was amended to provide for certain findings that must be made by the trial court when a party requests attorney fees. The mandatory findings concern: (1) whether an attorney fee award is appropriate; (2) whether there is a disparity in access to funds; and (3) whether one party is able to pay for legal representation of both parties.

"the earning capacity of each party" (taking into account the supported party's "marketable skills," the job market, and appropriate education or training to develop those skills) (§ 4320, subd. (a)(1)); the supporting party's ability to pay spousal support (*id*., subd. (c)); the obligations and assets of the parties (*id*., subd. (e)); the supported party's ability to be employed (*id*., subds. (e), (g)); the age and health of the parties (*id*., subd. (h)); and the "goal that the supported party shall be self-supporting within a reasonable period of time" (*id*., subd. (l)).

A pendente lite attorney fee award is reviewed for abuse of discretion. (*In re Marriage of Keech* (1999) 75 Cal.App.4th 860, 866.) "'[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made.'" (*Ibid.*) In addition, we review the court's factual findings (express and implied) for substantial evidence. (*McGinley v. Herman* (1996) 50 Cal.App.4th 936, 940-941; *In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 515 [in absence of a statement of decision, appellate court assumes "trial court found every essential fact to support the judgment"].) Husband bears the burden of proving the court abused its discretion by awarding wife attorney fees. (*In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 114, disapproved on a different point in *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 452-453.)

At the outset, we reject husband's general contention that the court took a "truncated" approach and did not consider the factors required under the relevant statutes. The reporter's transcript of the December 2010 hearing is 58 pages long and reflects the court's thorough consideration of the relevant factors. Early in the hearing, before counsel made their arguments, the court asked the attorneys to "hit some of the [section] 4320 factors . . . ." The court particularly invited counsel to discuss the parties' marketable skills, periods of unemployment, standard-of-living-based needs, obligations, assets, ages, and health, as well as their balance of hardships, any domestic violence incidents, convictions, and other factors. (The court noted that two statutory factors were

inapplicable to this case — minor children of the marriage and one party's contribution to the other's education or career.) Thus, the court asked to hear about numerous section 4320 factors. Counsel discussed them. Beyond these factors, husband's counsel additionally discussed the factor of the length of the marriage. Later, the court, in explaining its award, noted it had taken into account the section 4320 considerations to the extent they were relevant, "which a number of them aren't at this early stage."

But husband contends the court failed to consider the effect of husband's obligations under the stipulated order on his ability to pay wife's attorney fees. He stresses that wife's counsel, at the December 2010 hearing, estimated husband owes a "gross," "taxable" amount of $26,000 per month under the stipulated order for spousal support and mortgage payments. Essentially, husband complains that the "court made no definitive finding as to [his] income at the time of the hearing," so as to calculate whether he could afford to pay wife's attorney fees after paying the mortgages and spousal support mandated by the stipulated order. Husband points to the court's acknowledgment at the hearing that it was unclear whether his monthly income stream was $15,000, $79,000, or "somewhere in between." Husband argues that without "further competent evidence, the trial court abused its discretion as an ability to pay the requested fees was not substantiated."

This contention has no merit. Husband — not the court — is responsible for the lack of definitive information on his income at the time of the December 2010 hearing. Declarations of wife's counsel and of her forensic accountant attest to the "very limited financial information" they were provided by husband and his representatives. The limited tax returns husband did provide had been prepared by his tax accountant based on husband's "verbal representations" without documentary support. At the hearing, wife's counsel argued that even husband's accountant "has no records. None of us have any records [from husband]." Husband's counsel tried to excuse the absence of records by saying the documents were in the marital residence and that wife's counsel

had not offered to let husband search the residence. But there was no evidence husband made any effort to get permission to search the house for the records. Husband's failure to provide records may well have affected the court's assessment of his credibility. (Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust"].) The court stated husband would benefit from providing "transparency and full cooperation." Thus, husband himself was responsible for the court's inability to make a precise finding as to his exact income.

Nonetheless, the record does show the court was familiar with the stipulated order and determined husband was able to pay his obligations thereunder in addition to wife's requested fees. At the December 2010 hearing, wife's counsel argued that husband's gross taxable monthly financial obligation under the stipulated order equaled $26,000. (Husband signed the stipulation, affirming he understood the agreement fully, desired it to be made an order of the court, and realized that willful failure to comply with it could be a punishable contempt of court.) The court stated that husband's accountant's estimate of husband's monthly income as being "just under $20,000" was "ridiculously low"; the court based its conclusion at least in part on the stipulated order and husband's recent acquisitions. In addition, in response to the court's question, husband's new counsel stated husband had paid her a $50,000 retainer. And, in a declaration, wife's forensic accountant concluded, based on the "limited information thus far made available" by husband, that husband's non-taxable income was at least $70,000 per month.

Husband relies on *In re Marriage of Keech*, *supra*, 75 Cal.App.4th 860, where an appellate court reversed a trial court's attorney fee order. (*Id.* at pp. 862-863.) But in *Keech*, the court's order left the husband only "$93 per month after payment of his court-ordered obligations"; nor did the record reflect "any consideration of the husband's needs to pay his *own* outstanding legal fees during that period." (*Id.* at p. 868.) Here, in

contrast, husband had recently paid his counsel a $50,000 retainer and there was substantial evidence his monthly cash flow far exceeded his court-ordered obligations.

Husband also relies on *In re Marriage of Rosen* (2002) 105 Cal.App.4th 808, where this court reversed a trial court's spousal and child support award. (*Id.* at pp. 814-815.) But in *Rosen*, the trial court calculated spousal support based on the husband's cash flow two years before trial and ignored his recent tax return which reflected his income had decreased substantially. (*Id.* at p. 824.)

In sum, the court properly assessed husband's ability to pay wife's attorney fees, taking into account his obligations under the stipulated order.[5]

In a separate contention, husband asserts the court failed to consider wife's marketable skills, the job market for those skills, and other factors concerning her ability and duty to work. At the December 2010 hearing, the court suggested to husband's counsel that when it was her turn to argue, she "probably [shouldn't] really impute any income on a temporary basis with this economy and someone that didn't work outside the home for close to ten years." The court continued: "When we get down to run a permanent it's definitely important, but for temporary purposes for support or attorneys fees you don't need to hit that too hard." Husband concludes the court "dismissed discussion" of the issue.

But, in fact, evidence submitted by husband supports the court's implied finding that wife was unlikely to find employment quickly enough and with sufficient compensation to impact the court's decision on pendente lite attorney fees. In an October 1, 2010 report, husband's vocational expert opined that wife's current annual earning capacity was in the range of $28,000 to $50,000 in the fields of sales/account

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[5] In his reply brief, husband raises the issues that he allegedly has over $5 million of debt and wife allegedly owns three of the real properties and receives income from them. Because wife has "not had an opportunity to reply to these belated claims, we decline to address them." (*Savient Pharmaceuticals, Inc. v. Department of Health Services* (2007) 146 Cal.App.4th 1457, 1472.)

management or office support. The expert further opined that in the then current economy and labor market, it might take 90 to 180 days for wife to find such a job *after* refreshing her computer software skills through online tutorials.

Finally, husband contends no competent evidence substantiated the dollar amount of the fee award or its reasonableness. He argues case law requires disclosure of the nature and extent of an attorney's services and the court's evaluation of whether the work was reasonably necessary.

Contrary to husband's contention, ample evidence substantiated wife's fee request. With her August 2010 OSC (seeking, inter alia, attorney fees of at least $75,000), wife submitted declarations from her attorney and from her forensic accountant. Her attorney's declaration described his legal experience (18 years practicing family law exclusively); the hourly billing rates of attorneys at his firm, ranging from $250 to $700; the specific legal services they had already rendered on wife's behalf; and the specific legal services they anticipated rendering on her behalf within the next 90 to 120 days. The attorney declared wife had thus far incurred $28,014 in attorney fees and $7,463 in accountant fees. He estimated she would incur an additional $50,000 in attorney fees and $25,000 in accountant fees within the next 90 to 120 days. He requested the court to order husband to pay, on wife's behalf, at least $50,000 in attorney fees and $25,000 in accountant fees. Wife's accountant's declaration contained a description of the accounting services rendered on wife's behalf, as well as an estimate of the fees incurred. Wife submitted, as exhibits, her attorney's detailed billing statements and her accountant's curriculum vitae.

Subsequently, wife's December 6, 2010 income and expense declaration showed she had paid $56,278 (from borrowed funds) in attorney fees and costs and still owed $75,000. At the December 2010 hearing, wife's counsel orally requested $100,000 for attorney and accountant fees, which would cover the period through the preceding month and no prospective services.

Husband argues the August 2010 documentation "only addressed $85,476.78 in legal fees and litigation costs." He complains that wife submitted no further invoices or billing as evidence in her December 2010 filings or any updated declaration of counsel. He asserts wife's counsel's oral request at the December 2010 hearing for $100,000 greatly differed from the sworn declarations filed in August 2010.

The argument is without merit. The August declarations contain evidence of over $110,000 in attorney and accountant fees and costs already rendered or anticipated to be rendered. The trial judge discussed at length his conclusion, based on his awareness of "what a difficult case this is for both sides" (particularly for wife since she lacked "easy access . . . to information"), that the fees were reasonably necessary. (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1524 [trial court "'may rely on its own experience and knowledge in determining . . . reasonable value'" of legal services].) A request for pendente lite attorney fees may be made by an oral motion in open court at the hearing on the merits (§ 2031, subds. (a)(1) & (b)(1)) and may properly seek reimbursement for services that were anticipated in an earlier declaration (*In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1055).

The court's factual findings are supported by substantial evidence and the court did not abuse its discretion by awarding wife $100,000 in fees and costs.

DISPOSITION

The order is affirmed. Wife is entitled to her costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.